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No. 87-937

In The
Supreme Court of the United States
October Term, 1987

ATTORNEY GENERAL OF NEW JERSEY,
Petitioner,

v.

FIRST FAMILY MORTGAGE CORPORATION OF FLORIDA,
Respondent.

On Writ of Certiorari to the New Jersey Supreme Court

BRIEF BY PETITIONER IN OPPOSITION TO MOTION TO DISMISS OR VACATE

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STATEMENT OF THE CASE

The petitioner, the Attorney General of New Jersey, respectfully responds to the motion filed by the respondent, First Family Mortgage Corporation of Florida ("First Family"), for a dismissal of the petition for *certiorari* as moot. First Family maintains that the underlying mortgage foreclosure controversy which generated this appeal has been resolved, thus warranting this Court to vacate its order granting *certiorari* on the grounds of mootness. The Attorney General opposes this application on the basis that the controversy prompting this Court to grant *certiorari*

in the first instance, namely the constitutional validity under the Commerce Clause of the door closing sanction prescribed by the New Jersey Corporation Business Activities Reporting Act, *New Jersey Stat. Ann.* ("N.J.S.A.") 14A:13-14 *et seq.*, continues to be a viable issue between the parties in the present proceeding and remains an issue of public importance.

First Family is a Florida corporation involved in investing and servicing mortgages. Said corporation had neither a certificate of authority to do business in New Jersey nor did it file any corporation tax returns with New Jersey. Its activities in New Jersey involved owning and servicing mortgages secured by New Jersey real estate which yielded more than $25,000 per year in interest income.

The New Jersey Corporation Business Activities Reporting Act requires a foreign corporation, that has neither acquired a certificate of authority to do business in New Jersey nor filed a corporation tax return, to annually file with the New Jersey Director of Taxation a notice of business activities report in the event it transacts certain activities in New Jersey, including earning more than $25,000 from customers residing in New Jersey. *N.J.S.A.* 14A:13-15c. Failure to file a timely report bars a foreign corporation from maintaining an action in any federal or state court in New Jersey regarding a cause of action accruing during the period for which the report was not filed. *N.J.S.A.* 14A:13-20. The validity of this "door closing" mechanism is the subject of the present proceeding.

First Family instituted a mortgage foreclosure action in the New Jersey Superior Court, Chancery Division

against Mrs. Linda D. Durham. First Family had not previous to such court action filed a notice of business activities report with the State of New Jersey. The trial court dismissed the foreclosure action because First Family did not timely file the business report. Pet. App. 71a. First Family appealed the dismissal action to the New Jersey Superior Court, Appellate Division, challenging the sanction barring access to the courts for nonfiling on Commerce Clause and Supremacy Clause grounds.* No other issues were raised by First Family in any of the state court proceedings. The Appellate Division affirmed the trial court and sustained the dismissal of the complaint. Pet. App. 51a.

The New Jersey Attorney General intervened in the Appellate Division proceeding as a party defendant for the purpose of defending the constitutionality of the reporting act. The intervention accorded the Attorney General full rights and privileges as a participating party.** The Attorney General became the primary defendant in the Appellate Division proceeding and was the only participant, other than First Family, in the proceeding before the New Jersey Supreme Court. As previously noted, Ms. Durham is not participating in the proceeding before this Court as well.

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*The Supremacy Clause challenge involved the claim that the door closing sanction of the reporting act conflicted with the National Housing Act, 12 *U.S.C.* Sec. 1716 *et seq.* This claim was rejected by the Supreme Court of New Jersey and is not the subject of this petition.

**The intervention by the Attorney General was pursuant to New Jersey Court Rules 2:5-1(a), 4:28-4(a) and (d).

The Supreme Court of New Jersey, in a plurality decision, held that the sanction barring access to the courts for non-filing violated the Commerce Clause. Pet. App. 14a. The New Jersey court, however, performed "judicial surgery" and held that the sanction would be interpreted to permit subsequent filing of the activities report as a means of curing the nonfiling and permitting access to the courts. Pet. App. 18a.

The plurality decision held that the denial of access to the courts violated the Commerce Clause under a balancing-test analysis. The court held that the burden placed upon interstate commerce in denying access to the New Jersey courts was excessive and outweighed the interest of the state in protecting its tax base. The court determined that, without the right to enforce contracts made in interstate commerce, the right to engage in such commerce would be severely restricted. Pet. App. 15a-16a. Three justices agreed completely with the plurality decision. Two justices joined in the plurality decision but determined in a separate concurring and dissenting opinion that, under a balancing approach, the interest of the state in protecting its tax revenues is more significant than the relatively minor burden placed upon foreign corporations in simply filing the annual business activities report. This relatively insignificant burden was deemed outweighed by the important concern of New Jersey in protecting its tax dollars and encouraging tax reporting by foreign corporations. Pet. App. 21a.

Two justices filed a dissenting opinion holding that the denial of access to the courts constitutes a per se violation of the Commerce Clause and is thus invalid. The

dissent reasoned that previous precedents decided by this Court, particularly *Allenberg Cotton Co., Inc. v. Pittman*, 419 *U.S.* 20 (1974), have mandated that "door closing" statutes barring foreign corporations access to the courts interfere with interstate commerce and are facially void. Pet. App. 44a-45a. As previously noted, Linda Durham did not participate nor file any briefs in the proceeding before the Supreme Court of New Jersey.

Following the decision by the Supreme Court of New Jersey, First Family filed an appeal with this court claiming the door closing sanction is unconstitutional only on Commerce Clause and Supremacy Clause grounds. (Appeal Docket No. 87-717). No other state or federal questions were noted, discussed or raised in the appeal. The Attorney General filed a petition for *certiorari* seeking review of that portion of the decision below which permitted a foreign corporation to subsequently file the activities report as a means of curing the non-filing and permitting access to the courts. This Court granted *certiorari* and noted probable jurisdiction in these two cases.

Following the filing of the appeal and petition for *certiorari*, First Family has taken three steps which it claims moot this controversy. First, First Family filed a motion to dismiss its appeal pursuant to Rule 53. Second, First Family filed a business activities report with the New Jersey Director of Taxation for the present calendar period. Third, First Family recorded a satisfaction of the Durham mortgage with the appropriate county recording office. However, noticeably absent from the factual contentions made by First Family is any indication that First Family will discontinue to own and service

mortgages which are collateralized by New Jersey real estate and that said party will have no need to file business activities reports with New Jersey for future tax periods.

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ARGUMENT

THIS COURT PROPERLY GRANTED CERTIORARI IN THIS MATTER AND NEITHER MOOTNESS NOR ANY OTHER FACTOR SUPPORTS A DISMISSAL OF THE PETITION.

1. This Case Is Not Moot.

The Corporation Business Activities Reporting Act, *N.J.S.A.* 14A:13-14 *et seq.*, provides that every foreign corporation which carried on any activity or owned or maintained any property in this State during any calendar or fiscal accounting year ending after December 31, 1973 is required to file a notice of business activities with the New Jersey Director of the Division of Taxation. *N.J.S.A.* 14A:13-15. The activities or property maintenance in New Jersey which require foreign corporations to file this report are specifically delineated in the statute as follows: (a) the maintenance of an office or other place of business; (b) the maintenance of personnel; (c) the ownership or maintenance of real and/or tangible personal property directly used by the corporation in New Jersey; (d) the ownership or maintenance of tangible and/or intangible property which is used by others; (e) the receipt of payments from persons residing in New Jersey or businesses located in New Jersey aggregating in excess of $25,000.00 regardless of any other connec-

tions with this State; or (f) the derivation of income from any source or sources within New Jersey.

The Reporting Act further provides that a foreign corporation is not required to file the notice of business activities report if it received either a certificate of authority to do business in New Jersey or filed a timely tax return under either of the corporation taxes imposed by New Jersey. The Reporting Act requires that every foreign corporation subject to its provisions must file a notice of business activities report on or before the fifteenth day of the fourth month after the close of the corporation's calendar or fiscal accounting year. *N.J.S.A.* 14A:13-18. The notice form requests information necessary to the determination of whether a foreign corporation should be subject to a corporation tax.

In an effort to secure compliance with this law, the New Jersey Legislature provided that a foreign corporation, which has not obtained a certificate of authority or which disclaims corporate tax liability and which carries on the designated activities in New Jersey, is precluded from maintaining an action in the New Jersey courts if it failed to file a notice of business activities report for the period in which the cause of action accrued. *N.J.S.A.* 14A:13-20(b). *N.J.S.A.* 14A:13-20(c) provides for an exception to the statutory penalty in the event the court finds that a foreign corporation had a justifiable excuse in not filing and, in addition, has satisfied all corporate taxes or posted sufficient security with the Director of Taxation in lieu thereof.

The reporting act had its genesis in the *Report of the New Jersey Tax Policy Committee*, Vol. V, pp. 32-34,

(*"Report"*) submitted to Governor William T. Cahill on February 23, 1972. That same *Report* (Vol. V, pp. 20-25), also recommended the enactment of a second tier net income tax in order to impose a tax on foreign corporations neither qualified nor doing business within New Jersey in the traditional franchise tax sense but, nevertheless, deriving income from sources in this state and having adequate due process nexus with New Jersey to give this state jurisdiction to impose the tax. The second tier net income tax was enacted into law as *N.J.S.A.* 54:10E-1 *et seq.*, Laws 1973, chapter 170, and became effective June 7, 1973, contemporaneously with the effective date of the Corporation Business Activities Reporting Act (Laws 1973, chapter 171).

The *Report* noted that New Jersey already had on its books a statute requiring a foreign corporation to obtain a certificate of authority from the Secretary of State before doing business in the State. *N.J.S.A.* 14A:13-1 and 4. Although the sanctions in that law for failure to obtain a certificate of authority included small fines as well as a prohibition against the maintenance of suits in the New Jersey courts (*N.J.S.A.* 14A:13-11), the Tax Policy Committee felt that this statute was not a reporting statute related to protecting the tax revenues of the state, particularly in the context of the proposed enactment of a second tier net income tax.

The *Report* thus recommended the enactment of the Corporation Business Activities Reporting Act in order to establish a means for the New Jersey Division of Taxation to secure data from foreign corporations maintaining prescribed activities in New Jersey in order to deter-

mine the possible subjectivity of such corporations to the New Jersey tax laws. It is clear in analyzing the statute that mere compliance with its provisions by filing the required notice does not result in subjecting a complying foreign corporation to a tax or to any other liability. Rather, the notice requirement is merely informational and permits the Division of Taxation to initiate an investigation in order to determine whether the foreign corporation may be subject to a state tax.

First Family, although having now filed an activities report with New Jersey and having dropped the foreclosure action against Ms. Durham, will, nevertheless, continue to operate its mortgage business in New Jersey and will be required to file activity reports for future tax periods in order to avoid the door closing sanction of the statute. First Family will thus have a continuing responsibility to comply with the statute.

In addition, the Attorney General intervened in this matter not to defend Ms. Durham but to preserve the constitutionality of the Reporting Act and the door closing sanction. The Attorney General had an obvious independent interest and stake in preserving the validity of the statute that clearly differed from Ms. Durham's more limited concern about the foreclosure action. As previously noted, the Attorney General participated at the state Supreme Court level even after Ms. Durham was no longer involved in this proceeding. The Attorney General thus participated in this matter to sustain the door closing sanction as a means of encouraging foreign corporations to comply with the reporting requirements of the law. The ultimate goal of such reporting is to alert

the New Jersey taxing officials of threshold conduct in this state by nontaxpaying foreign corporations.

Clearly this proceeding is not moot simply because First Family has dropped its foreclosure claim in the state court. Mootness is a function of the requirements of the United States Constitution (Art. III, Sec. 2) that "the exercise of judicial power depends upon the existence of a 'case' or 'controversy'." *Liner v. Taffeo, Inc.*, 375 *U.S.* 301, 306 n.3 (1964). This requirement is premised on the need for "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 *U.S.* 186, 204 (1962).

The State of New Jersey, having been a party below, remains a party in this Court under Rule 10.4. Moreover, the State of New Jersey, by having invoked this Court's appellate jurisdiction to defend the constitutionality of its statute, has thereby satisfied the "case" or "controversy" standard. *Diamond v. Charles*, 476 *U.S.*, 54, 57 (1986).

The present situation is a classic example of litigation which is "capable of repetition but evades review." *Roe v. Wade*, 410 *U.S.* 113, 125 (1973); *Moore v. Ogilvie*, 394 *U.S.* 814, 816 (1969); *Southern Pacific Terminal Co. v. I.C.C.*, 219 *U.S.* 498, 515 (1911). That principal was applied in *California Coastal Commission v. Granite Rock*, — *U.S.* —, 94 *L.Ed.*2d 577 (1987), to reject a mootness contention. The controversy there related to the possible preemption of California's authority to regulate mining operations in a national forest in light of existing federal standards. Although the mining company's "five-year

plan'' to mine the forest had expired by the time the proceeding reached this Court, the controversy was not deemed moot because it was likely that the mining company would resume its operations at a future time. In light of the potential for the questionable action to be resumed by the mining company sometime in the future, the controversy was capable of repetition yet evading review. 94 *L.Ed.*2d at 590.

Similarly, in *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 *U.S.* 282 (1986), a challenge arose to the jurisdiction of a state agency, under federal preemption, from debarring repeat violators of a state law from doing business with the state. Although, by the time the case reached this Court, the debarrment period had expired, the problem was considered capable of repetition and yet evading review. 475 *U.S.* at 227 n. 3.

Obviously the present controversy is capable of repetition because First Family intends to continue to hold mortgages collateralized by New Jersey property and to maintain business operations in New Jersey sufficient to enforce the mortgage debt and foreclose on such properties if necessary. Such operations require the utilization of the courts to institute tax foreclosure actions. The need for First Family to file annual business activities reports in the future in order to avoid the door closing sanction of the reporting statute is thus likely to continue. Notwithstanding First Family's present willingness to file the activities report, there is clearly no certainty that such filings will be made in the future. Absent such certainty, there is a clear likelihood that the instant controversy can be repeated. *Cf. Weinstein v. Bradford*, 423 *U.S.* 147, 148 (1975).

There is a further line of decisions by this Court supporting the proposition that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W.T. Grant Co.*, 345 *U.S.* 629, 632 (1953). A party's determination to unilaterally purport to resolve a pending controversy will result in a moot case only if "there is no reasonable expectation that the wrong will be repeated." Otherwise the party "is free to return to his old ways. . . ." *Id.* at 632.

In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 *U.S.* 283 (1982), a provision of a municipal ordinance was challenged on the grounds of vagueness. While the case was pending before this Court, the municipality amended the ordinance to eliminate the questionable provision. This Court rejected a mootness contention raised by the municipality and noted that the abandonment of objectionable behavior by a litigant does not deprive a court of judicial power.

> In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated. . . . There is no certainty that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction. We therefore must confront the merits of the vagueness holding. [*Id.* at 159-60].

Thus, the ability of a party to unilaterally withdraw from a challenged action and thereby moot the controversy allows for possible manipulation of the judicial system, particularly where the action can be repeated.

Although the motives of First Family in resolving the Durham dispute may be quite innocent, the concern here must relate to the potential for abuse. First Family has given no assurances that it will consistently comply with the Reporting Act in the future. It obviously finds the plurality holding of the New Jersey Supreme Court to be a tolerable result. A mootness holding by this Court without a complementary vacation of the state Supreme Court decision would clearly establish the state Supreme Court decision as final. The State of New Jersey would then be saddled with a state court opinion on a significant Commerce Clause issue without the benefit of further review by this Court. First Family and other foreign corporations seeking to avoid detection by the New Jersey taxing authority could operate in this state with impunity while defying compliance with the Reporting Act. Because the door closing sanction, as interpreted by the New Jersey Supreme Court, has been significantly emasculated by the allowance of subsequent curing, that decision is obviously more preferable to foreign corporations peripherally operating in New Jersey than risking a decision by this Court confirming the validity of the door closing mechanism. The Attorney General is obviously concerned about laboring under a New Jersey Supreme Court decision which he finds unacceptable. The validity and propriety of the door closing sanction clearly has a wide application that relates not only to First Family but to countless other undetected foreign corporations that earn income in New Jersey.

Therefore, since this matter is capable of repetition but evades review and because it involves a voluntary cessation of improper conduct as a means of depriving this

Court of jurisdiction to review this matter, this case is not moot. Moreover, because this matter concerns an issue of great public importance regarding the ability of a state to protect its revenue sources by a reasonable door closing mechanism complementing a reporting statute (*United States v. W.T. Grant, supra,* 345 *U.S.* at 632), this case should not be dismissed on the grounds of mootness.

However, should this Court dismiss this case as being moot, it is respectfully urged that such order of dismissal should include a directive vacating the decision by the Supreme Court of New Jersey and remanding this matter to that court "for such proceedings as that court may deem appropriate." *Defunis-v. Odegaard,* 416 *U.S.* 312, 320 (1974); *Brockington v. Rhodes,* 396 *U.S.* 41, 44 (1969); *Garvin v. Cochran,* 371 *U.S.* 27 (1962).

2. The Petition Was Not Improvidently Granted.

First Family maintains that the petition should be dismissed as having been improvidently granted for three reasons: 1) because this case now lacks essential adverseness in light of the resolution of the mortgage dispute; 2) because First Family failed to raise below the issue of "reasonable ignorance" of the reporting requirements as an exception to the door closing sanction of the statute; and 3) because First Family, in light of holding GNMA-backed mortgage obligations, enjoys some undefined federal immunity from a state door closing sanction.

With respect to the initial contention that the present controversy lacks sufficient adverseness, it suffices to note that this allegation was explicity considered in the mootness discussion, *supra.* If this case is not moot, it clearly involves an adversarial confrontation that satisfies the

"case" or "controversy" standard of the Constitution. *Diamond v. Charles, supra,* 476 *U.S.* at 57.

In its second argument on behalf of dismissal, First Family maintains that it simply failed to raise its alleged reasonable ignorance of the reporting requirement as a defense to the door closing sanction of the Reporting Act. This contention is astounding particularly since it is now being raised for the very first time. The mechanics of the statutory door closing sanction and the exceptions thereto were explicitly detailed in the various briefs filed and court opinions rendered at each level of this litigation in the state courts. In none of these proceedings did First Family raise even a murmuring of ignorance of the reporting statute in justification for its nonfiling of the activities report. That defense should be deemed waived on legal and equitable grounds at this time and clearly should not be the basis for dismissing this petition.

The final contention raised by First Family concerns the status of the GNMA obligations. This allegation appears to raise questions as to federal supremacy and preemption relating to the valid application of the door closing sanction to actions filed to enforce GNMA-backed instruments. This allegation seems similar if not identical with the previous contention raised by First Family in its appeal to this Court (87-717). First Family maintained in that appeal that the door closing sanction was inapplicable to First Family in light of the National Housing Act, 12 *U.S.C.* Sec. 1716 *et seq.,* because of principles of supremacy and preemption. In light of the application by First Family for a voluntary dismissal of that appeal under Rule 53, the present contention relating to the GNMA obligations appears incongruous.

However, even if this argument has some merit, this Court has in the past addressed important constitutional issues, following which the matter was remanded to the state courts for consideration of other state or federal questions not addressed. *See Popasan v. Allain*, 478 *U.S.* —, 92 *L.Ed.*2d 209, 236 (1986); *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 414 (1982). Therefore, the mere existence of new issues not previously considered by the state courts below clearly does not undermine the significance of the Commerce Clause issue now properly before this Court and does not support a dismissal of the petition as having been improvidently granted.

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CONCLUSION

It is respectfully submitted, therefore, that the motion for dismissal of the grant of *certiorari* should be denied. Alternatively, should the petition be dismissed on grounds of mootness, this matter should be remanded to the Supreme Court of New Jersey in conjunction with vacating that court's decision in this matter.

Respectfully submitted,

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